

**IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA**

UNITED STATES OF AMERICA	:	CRIMINAL ACTION NO. 05-20-01
	:	
v.	:	CIVIL ACTION NO. 06-2487
	:	
MICHAEL LUCIDONIO	:	

MEMORANDUM OPINION

Savage, J.

October 3, 2006

The defendant, who was sentenced to a term of imprisonment to be followed by supervised release after pleading guilty to conspiracy, forging counterfeit currency and possession of counterfeit currency, has filed a *pro se* motion under 28 U.S.C. § 2255. He argues that: (1) the court had no jurisdiction to impose supervised release because it violated the separation of powers doctrine; (2) his sentence should not have been calculated on the basis of the amount of counterfeit currency exceeding \$5,000.00 when only \$4,490.00 had been seized and passed; and (3) his counsel was ineffective for allowing him to stipulate to the two level increase based upon the value of the counterfeit currency exceeding \$5,000.00 and for failing to object to the imposition of supervised release. He does not contest the validity of his guilty plea or the plea agreement. Nor does he question the appellate waiver.

The government seeks dismissal of the motion because the defendant waived his appellate rights, including the right to collaterally attack his sentence, in his plea agreement. In the alternative, the government argues that the defendant's claims are without merit.

Because the defendant knowingly and voluntarily waived the right to collaterally attack his sentence, and upholding the waiver will not result in a miscarriage of justice, the

defendant's motion will be denied. Even if there were no valid waiver, the defendant's claims fail on the merits.

Procedural History

The defendant was charged in an indictment on January 13, 2005, with conspiracy, forging counterfeit currency and possessing counterfeit currency. On April 13, 2005, pursuant to a written agreement, the defendant entered a guilty plea. The plea agreement included a waiver of appellate rights, including a waiver of his right to pursue a collateral attack through a habeas motion to vacate, set aside or modify his sentence. The defendant limited his right to appeal to three instances: (1) if the government appealed, (2) his sentence exceeded the statutory maximum, or (3) the sentencing judge erroneously departed upward from the sentencing guideline range.

On July 6, 2005, the defendant was sentenced to 36 months imprisonment and three years supervised release. On July 24, 2006, the defendant filed his *pro se* motion under 28 U.S.C. § 2255. The government filed its response in opposition.

The Appellate Waiver

Appellate waivers are valid and enforceable if entered knowingly and voluntarily, and enforcing them will not work a miscarriage of justice. *United States v. Khattak*, 273 F.3d 557, 558 (3d Cir. 2001). Appellate waivers cover meritorious and debatable claims. Later changes in the law do not affect the validity of a waiver nor the guilty plea itself. *United States v. Lockett*, 406 F.3d 207, 213 (3d Cir. 2005). A waiver of appeal includes relinquishing “the opportunity to challenge the sentence imposed, regardless of the merits”. *Khattak*, 273 F.3d at 561.

A waiver may be invalidated in the unusual circumstance where an error amounts to a miscarriage of justice. *Id.* at 561-62. Analyzing whether an appellate waiver should be set aside to avoid a potential miscarriage of justice, the court considers a number of factors. *Id.* at 563. Relevant factors include “the clarity of the error, its gravity, its character (e.g., whether it concerns a fact issue, a sentencing guideline, or a statutory maximum), the impact of the error on the defendant, the impact of correcting the error on the government, and the extent to which the defendant acquiesced in the result.” *Id.* (quoting *United States v. Teeter*, 257 F.3d 14, 26 (1st Cir. 2001)). While noting that it “chose not to earmark specific situations,” the *Khattak* court stated that these factors are offered as “some guidelines,” and emphasized that the governing standard is one of a “miscarriage of justice.” *Id.* at 563.

Only where the petitioner claims that the waiver itself was the result of counsel’s ineffectiveness will courts decline to enforce an appellate waiver when a petitioner claims ineffective assistance of counsel in a 28 U.S.C. § 2255 motion. *United States v. White*, 307 F.3d 336, 337 (5th Cir. 2002); *United States v. Clark*, No. 05-2201, 2006 WL 1096157, at *2 (3d Cir. Apr. 26, 2006). Thus, all other ineffectiveness contentions are precluded by the waiver.

To ensure that an appellate waiver is knowing and voluntary, the judge must inform the defendant of the plea agreement provisions waiving the right to appeal or collaterally attack a sentence, and determine that the defendant understands the waiver. *Khattak*, 273 F.3d at 560. In his motion, the defendant does not contend that he entered the plea agreement unknowingly or involuntarily, or that he did not understand the waiver. At his

guilty plea, the defendant was specifically advised of his appellate rights and his right to collaterally attack his sentence by a habeas petition. He acknowledged he had these rights and that he was relinquishing them. Thus, the defendant's appellate waiver was knowing and voluntary; and, absent a miscarriage of justice, it should be enforced.

Justice will not be compromised by enforcing the waiver. The defendant's convoluted argument with respect to the court's lacking jurisdiction to impose a term of supervised release is frivolous. Congress specifically authorized district courts to impose a term of supervised release as part of a sentence of imprisonment. 18 U.S.C. § 3583(a).

The defendant, who was on parole at the time of these offenses, was sentenced to 36 months in prison, in the middle of the applicable range. He faced a possible guideline sentence of 41 months, the top of the range, and a statutory maximum of 45 years. At the close of the sentencing hearing, the defense attorney advised the defendant of his appellate rights, including the appellate waiver.

Because the waiver was knowing and voluntary, it will be enforced. The government did not appeal the sentence, and the sentence was within the guidelines range and did not exceed the statutory maximum sentence. The defendant has not offered nor do I find any circumstances that would result in a miscarriage of justice by enforcing the waiver. Therefore, the appellate waiver will be upheld.

Ineffective Assistance of Counsel

Even if the appellate waiver were invalid, the defendant's claims fail on the merits. The defendant argues that his counsel was ineffective because he allowed him to enter into a negotiated plea agreement which stipulated that the amount of the counterfeit currency exceeded \$5,000.00 when less than that amount had been seized and passed.

An ineffective assistance of counsel claim is evaluated under the two-step *Strickland* test which considers, first, whether counsel's performance was so deficient as to constitute a denial of counsel; and, if so, then, whether the alleged errors prejudiced the defendant by depriving him of a fair trial. *Strickland v. Washington*, 466 U.S. 668, 687 (1984).

The defendant cannot demonstrate that his attorney's performance was deficient. Counsel acted professionally and in the best interest of his client. He negotiated an agreement that gave the defendant the benefit of a two level reduction for acceptance of responsibility. Defense counsel had no reason to question that the amount of the counterfeit money was less than \$5,000.00. The defendant stipulated that the amount of counterfeit currency was based upon not only what the government had recovered but upon the defendant's own admission which he made at the time of his arrest. Furthermore, at his guilty plea colloquy, the defendant admitted that he was responsible for generating in excess of \$5,000.00 in counterfeit currency. In short, the defendant does not contest that he was guilty nor that the counterfeit currency manufactured by the conspirators exceeded \$5,000.00.

Had the defendant not entered into the plea agreement, the government was prepared to prove through the admission of his confession and the testimony of his co-defendants that the defendant had manufactured in excess of \$5,000.00 of counterfeit money. Had he not entered into the agreement, he would not have gotten the benefit of the two level reduction for acceptance of responsibility. Consequently, the defendant cannot establish any prejudice.

Conclusion

The defendant's appellate waiver was knowing and voluntary, and enforcing it will not work a miscarriage of justice. Even if the waiver were invalid, the defendant's claims are meritless. Therefore, the motion will be denied.

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ORDER

AND NOW, this 3rd day of October, 2006, upon consideration of the defendant's Motion to Vacate, Set Aside, or Correct Sentence Under 28 U.S.C. § 2255 (Document No. 53), the government's response, and the Plaintiff's Rebuttal to Government's Response (Document No. 57), it is **ORDERED** that the motion is **DENIED**.

IT IS FURTHER ORDERED that because the defendant has failed to make a substantial showing of the denial of a constitutional right, there is no ground to issue a certificate of appealability.

TIMOTHY J. SAVAGE, J.